Gem City Ready Mix Co., and Western Ready Mix Co., Jointly and Jack Roberts. Case 14-CA-14052

19 June 1984

DECISION AND ORDER

By Chairman Dotson and Members ZIMMERMAN AND HUNTER

On 12 May 1981 Administrative Law Judge Harold Bernard Jr. issued the attached decision. The Respondent and Teamsters Local 688, Party in Interest, I filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The complaint alleges that the Respondent accorded preferential seniority rights to economic striker replacements in violation of Section 8(a)(1) and (3). Before the judge, and in its exceptions, the Respondent argued that the preference was extended pursuant to a valid strike settlement agreement between the Respondent and the Union. The judge concluded, however, that the settlement agreement was not a valid bar to the reinstatement to which the strikers otherwise were entitled, because there was a "no evidence that returning strikers expressly or consciously yielded their rights under the Act to be free from unlawful discrimination upon their reinstatement."

We disagree with this conclusion and, for the reasons given below, shall dismiss the complaint.

The strike settlement agreement in issue here was drafted by union business representative McGee. It was freely entered into by the Respondent and the Union, and fully understood and ratified by the Union's members. It provided, among other things, that the three employees who worked during the strike were to be placed at the top of the seniority list. There was, as McGee testified, no doubt on the part of the Union or its members that the agreement had this effect.

The striking employees themselves fully understood both the terms and effects of this aspect of the settlement. In relaying the proposal, union steward Nelson recommended that it was "better to be number 4 or 5 on the [seniority] list [that is, behind the three strike replacements who would re-

ceive top seniority under the Respondent's strike settlement proposal] than to be number 10 or 11." After thorough discussion, and with an obvious understanding of the ramifications of their action, they voted to accept the Respondent's offer.

Based on all the above, the judge found that

[T]here is no doubt that [the clear grant of preferential seniority to three strike replacements] was Respondent's expressed intent, and was communicated to the union representative as well as the union membership so that the grant of top seniority was an explicit condition in Respondent's final offer to settle the strike.

Following the membership's acceptance of the Respondent's strike settlement proposal, the Union notified the Respondent that they (i.e., the Union and the Respondent) had an agreement. The provisions granting top seniority to the three strike replacements expressly were written into the new collective-bargaining agreements by the Union itself and these provisions subsequently were implemented and given full force and effect.

The judge found that this evidence did not establish that there was a waiver of employee statutory rights sufficient to justify the preferential treatment accorded to strike replacements under the new collective-bargaining agreement. Given his other factual findings, the judge seems to have suggested that, for the waiver to be a valid one, it must have included a specific statement demonstrating an understanding that returning strikers explicitly waive their rights "under the Act."

The Board never has required, as a condition for finding a valid and binding waiver of rights under the statute, that the waiving party be shown to have clearly and unmistakably understood that a right voluntarily relinquished was one that could not lawfully be denied *involuntarily*. Just as ignorance of the law does not excuse conduct which violates it, ignorance of the law does not revoke conduct which legitimizes what might *otherwise* violate the law. It is sufficient for a finding of a valid waiver of rights under the Act that the waiving party or parties be shown to have clearly and unequivocally relinquished or foregone a course of conduct, even if that conduct otherwise was protected.

In short, a waiver of what constitutes a legally protected right is not invalidated on the basis that the waiving party or parties may not have realized that the right waived was otherwise protected by the Act.

The policy of the National Labor Relations Act is to encourage the practice and procedure of collective bargaining as a means of resolving labor dis-

¹ Teamsters Local Union No. 688, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America was a Party in Interest to this proceeding.

putes,² including the encouragement of the negotiation of strike settlement agreements.³ In furtherance of this public policy, the Board long has recognized that statutory rights, including even the fundamental right to strike,⁴ can be waived.

As a general rule, in order to establish a waiver of a statutory right, there must be a clear and unmistakable relinquishment of that right. Whether there has been such relinquishment is to be decided on the basis of all the facts and circumstances surrounding the making of the contract in question. More precisely, waivers of statutory rights "must be clearly and unmistakably evidenced either in the terms of the parties' bargaining contract or in the nature of the prior contract negotiations." However, while waivers of rights are indeed not lightly to be inferred, they need not, on the other hand, be evidenced by an express statement of waiver.

By these standards, it is clear that the Union, with the subsequent concurrence of its membership, waived full prestrike seniority on behalf of returning strikers in return for an opportunity to end the strike and return to work. Under these circumstances, it was satisfactorily demonstrated that

Chairman Dotson and Member Hunter find it unnecessary to distinguish Daniel Construction Co. here because they do not agree with the Board majority's decision in that case.

Member Hunter agrees that in this case the Union clearly and unmistakably waived the employees' Sec. 7 rights, and that the waiver is established by the literal language of the parties' agreement. *Metropolitan Edison Co. v. NLRB*, 103 S.Ct. 1467, 1477-1478 (Apr. 4, 1983). In view of the Supreme Court's holding on this point, Member Hunter finds Statler Hilton Hotel irrelevant.

In American Cyanamid Co., 235 NLRB 1316 (1978), relied on by the judge, there was no contractual agreement which even arguably constituted a waiver of rights under the Act. The employees were unfair labor practice strikers not economic ones, and the employers refused to reinstate 400 unfair labor practice strikers who had made, through the union, an unconditional offer to return to work. Furthermore, the employer in that case conditioned the reinstatement of approximately 200 of these unfair labor practice strikers on the complete relinquishment by the other 200 unfair labor practice strikers of their equal right to reinstatement.

awarding top seniority to the two nonstriking employees and the strike replacement was a lawful implementation of a right clearly understood by all affected to have been created through the collective-bargaining process. Accordingly, we shall dismiss the complaint in its entirety.

ORDER

The complaint is dismissed.

DECISION

STATEMENT OF THE CASE

HAROLD BERNARD JR., Administrative Law Judge. This case was tried before me on November 18, 1980, in Quincy, Illinois, on allegations in the complaint, as amended October 1980, that Respondent accorded preferential seniority rights to economic striker replacements in violation of Section 8(a)(1) and (3) of the Act. Respondent's defense is that it acted to grant such preference pursuant to a valid strike settlement agreement between Respondent and the Union fully understood and ratified by its employees.

On the entire record, including my observation of the demeanor of the witnesses, and consideration of briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The parties agree, and the record shows, that Gem City Ready Mix Co. and Western Ready Mix Co., Illinois corporations engaged in manufacture and sale of concrete at locations in Quincy, Illinois, each annually purchases products valued in excess of \$50,000 directly from sources outside Illinois, and each annually sells products valued in excess of \$50,000 directly to customers located outside Illinois. Concededly, Gem and Western are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and I so

² H. J. Heinz Co. v. NLRB, 311 U.S. 514, 524 (1941).

³ See Spielberg Mfg. Co., 112 NLRB 1080 (1955).

⁴ See, e.g., Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95 (1962) (implied waiver of right to strike); General Electric Co., 173 NLRB 164 (1968). The judge relied on Daniel Construction Co., 239 NLRB 1335 (1979), and Mastro Plastics v. NLRB, 350 U.S. 270 (1956), for support in his rejection of the Respondent's waiver defense. We find such reliance to be misplaced in this case. In Daniel, the Board merely reiterated its well-established position that relinquishment of the right to engage in sympathy strikes will not, without more, be inferred from the mere presence of a no-strike clause in a collective-bargaining agreement, and that contractual waiver of the right to engage in sympathy strikes will only be found if such an intent is embodied expressly in the contract itself or is clearly evident from the relevant bargaining history. In Daniel, the Board found no evidence of either indicia of waiver, whereas in the instant case the evidence of a knowing, purposeful waiver on relative seniority is clear and unmistakable. Likewise, in Mastro Plastics, the Court simply held that a no-strike clause in a collective-bargaining agreement does not, without more, constitute an implied waiver of the right to strike solely against unfair labor practices—a legal issue and factual setting far removed from the case here.

⁵ Rose Arbor Manor, 242 NLRB 795, 798 (1979).

⁶ Statler Hilton Hotel, 191 NLRB 283, 288 (1971), and cases cited therein.

⁷ Alliance Mfg. Co., 203 NLRB 437, 439 (1973).

¹ Counsel Delmer R. Mitchell, representing three employees accorded seniority preference in the parties' strike settlement agreement, originally sought full intervention, which was opposed by the General Counsel at the hearing and in a written memorandum of opposition received into the record (G.C. Exh. 1-u). After discussion on and off the record, and it appearing that attorney Mitchell had no relevant evidence to produce not already available to the parties as well as the probability that Respondent's position was strongly in common with upholding attorney Mitchell's position, I granted the latter limited intervention to remain at counsel table with the three employees, review exhibits, discuss trial developments with Respondent, make oral argument, and file a brief. He agreed on the record to be satisfied with such arrangement and accepted the limited intervention. Mitchell in fact made oral argument and filed a brief, which has been carefully considered. Although accorded these opportunities, Mitchell at no time advanced the contention that he had relevant evidence not brought forward onto the record by the parties, nor does he now do so. I therefore find no merit to Respondent's contention at the hearing in opposition to limiting attorney Mitchell's intervention as no prejudice whatsoever has been demonstrated and the ruling, which was agreed to by attorney Mitchell, was in accord with settled principles. National Licorice Co. v. NLRB, 309 U.S. 350 (1940); Camay Drilling Co., 239 NLRB 997, 998 fn. 10 (1978); Strydel Inc., 156 NLRB 1185, 1188 fn. 2 (1966); and East Ohio Gas Co., 140 NLRB 1269 (1963).

find. Further, in view of the parties' stipulation showing common or interlocking ownership and directors, a common labor relations policy, sales accommodations between both companies for each other's convenience, partial common use of batching facilities, a common liaison officer between the directors and management for each company, some common use of equipment for training purposes, joint collective bargaining for both companies to a significant extent, and that daily labor relations policy in the form of settlement of grievances for each company is controlled by the same official, John R. Fierke, I find that Gem City and Western constitute a single employer hereinafter referred to as Respondent or seperately as Gem or Western. Petroleum Electronics, 250 NLRB 265 (1980); Smyth Mfg. Co., 247 NLRB 1139 (1980).

II. THE LABOR ORGANIZATIONS INVOLVED

The parties agree that Local Union No. 21, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, a predecessor union to Local Union No. 688, Teamsters until November 1, 1980, when it merged with and was subsumed within Local 688, and that Local 688 itself are both labor organizations within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. Background

For several years, Gem and Western were parties to collective-bargaining agreements with Teamsters Local 21 covering the truckdrivers at each company. These agreements provided, inter alia, that the drivers' seniority in employment would be a governing factor in all cases of decreasing and increasing the work force, promotions, and filling vacancies. (R. Exhs. 2 and 3.) The record also clearly shows that seniority—which was established on a plantwide basis rather than a single system embracing both companies—also governed the assignment of both daily and Saturday overtime. Lists of drivers in descending order of seniority were maintained at each location and, with limited exceptions arising from the decision not to interrupt a continuing delivery of ready mixed concrete resulting in the originally assigned driver continuing the delivery irrespective of his seniority, such overtime assignments regularly were based on seniority.

The most recent contracts were effective from July 1, 1977, to June 30, 1980. As expiration of the agreements approached, the parties conducted negotiations touching on wages, contract duration, and a work-guarantee clause in some five or six contacts or negotiating sessions between May 27 and July 8 without reaching agreement on terms, whereupon the employees engaged in an economic strike on July 9. That same day, Respondent sent letters to the employees advising them to return to work by Monday, July 14, or it would hire new permanent employees to take the jobs they had vacated (G.C. Exh. 2).

Two strikers, Rodney Douglas and Frank Baird, Western drivers, crossed the picket line and returned to work on July 14, and Respondent hired a replacement at Gem, Dick Lockman on July 15, the final day of the strike. That same day, following the above events, the parties met in a negotiating session, wherein Respondent admits it presented a "final offer" to settle the strike (G.C. Exh. 3).2

B. Respondent's Final Offer

Present for the Union were business representative C. A. McGee, Jack Roberts, steward at Gem, and John Nelson, steward at Western. Respondent was represented by John R. Fierke, vice president of Gem and treasurer for Western, an admitted supervisor and highly authoritative representative of Respondent. There is no dispute as to the essential facts concerning this meeting. Witness Roberts testified forthrightly that Respondent representative Fierke presented a final offer which, inter alia, included raises of \$60, \$50, and \$50 over the next 3 years and that the "3 replacements" (Douglas, Baird, and Lockman) were to be placed at the top of the seniority list. He recalls McGee responding that this was a "dirty trick" to employees who had worked so long for Fierke. He also recalls that Nelson asked Fierke, just after the final offer was made, where the three men would be on the seniority list and that Fierke replied wherever we needed them, they would work—a statement undenied by Fierke and indicating that, in addition to being accorded top seniority, the three men were to be accorded cross-over top seniority between both groups of drivers, rights not previously in existence for any employee under the separate single-plant seniority systems.

McGee testified that when Fierke presented the proposal both he and Roberts asked what it meant, and that Fierke said, "We are not going to let them go, we are going to work them first, and however we want to work them." McGee, without denial by any Respondent witness, testified that there was never any doubt on anybody's part that the intent of the Company's proposal (R. Exh. 3) was to accord top ranking seniority to the three employees.

Although it was agreed that, if called to testify further, Fierke would deny in effect telling McGee that the final offer gave the three superseniority, I credit the reliable testimony to the effect that the final offer insisted on by Respondent granted top seniority to the three individuals who went to work during the strike.

This conclusion, not seriously contested by Respondent, is overwhelmingly proven by, in addition to the

² The written proposal was as follows:

Our final offer is this: 60,50,50 with pension deducted and negotiating a new contract without a guarantee clause. As you know, we have hired 3 replacements so far, and they are permanent replacements, and we cannot fire them, but, if your men see fit to accept this offer, we would be willing to take them back in the order of their past seniority as the need arises.

These men are economic strikers and as such are subject to laws governing this, one of which is that permanent replacements cannot be fired to make room for them.

Although the final offer does not provide en haec verba for the clear grant of preferential seniority to the three individuals, as shall be seen below, there is no doubt that this was Respondent's expressed intent, and was communicated to the union representative as well as the union membership so that the grant of top seniority was an explicit condition in Respondent's final offer to settle the strike.

above testimony, the subsequent events. Thus, at a union meeting after the final offer—that same day at 3 p.m. the proposal was relayed to the union members whose reaction was, in Roberts' view, to be upset over the proposal's unfairness. Nelson spoke in favor of the proposal telling members it was better to be number 4 or 5 on the list (apparently referring to the fact that the top three slots were already filled by the three individuals who crossed the picket line) than to be number 10 or 11. The members voted to accept the final offer by a vote of 8 to 5 and the Union notified Respondent it had an agreement. It is obvious from the foregoing that Fierke's final offer had in fact provided for the top seniority, and that, as testified by Roberts, Fierke had attributed such feature to the final offer in the meeting with the Union earlier as it is entirely improbable that the Union would have proposed on its own so unpalatable an abandonment of valuable employee rights. Still further proof to such effect is that the preferential rights described above were specifically written into these proposed new contracts (R. Exhs. 2 and 3),3 and were indeed expressly given full force and effect by Respondent, although the wage increase provisions still awaiting finalization in signed contracts at the time of the hearing, had not been implemented.

C. The Implementation of Preferential Seniority

The record shows beyond dispute that since the end of the economic strike on July 15 the Respondent implemented the favorable seniority terms set forth in its final offer as more fully described by Fierke on behalf of Douglas, Baird, and Lockman with regard to daily and Saturday overtime work and recall rights, to the detriment of former strikers who would have enjoyed such benefits were their earlier higher places in the seniority lists honored rather than being reduced by the top seniority accorded Douglas, Baird, and Lockman.

Thus, union steward Jack Roberts testified that the three individuals who crossed the picket line have been given top seniority and preference over all other employees in overtime and recall matters as personally witnessed by him. Roberts specifically noted that although driver James Fierge was at the top of the Gem seniority list and prior to the strike was offered first crack at Saturday work, since then Lockman is given first choice. He testified that Lockman also receives first choice over Fierge regarding daily overtime work assignments as well, also an assignment for which Fierge formerly had first choice.

Driver John Nelson, holder of the longest seniority at Western, testified that since the strike he and the second most senior driver at Western, Junior Padgett, have been relegated below Baird and Douglas regarding retention when less than a full complement of drivers is needed at Western. Driver James Harris at Gem corroborates Roberts' account but goes beyond describing how Fierge and then he have both lost seniority to Lockman alone by his testimony that he and Fierge have been relegated behind all three who crossed the line. Harris testified that Respondent has it set up so the other two can work at either location in addition to specifically describing how Lockman receives top seniority for daily and weekend overtime assignments. While Harris was not asked to provide specific examples to support his assertion that the three employees were given top seniority at both operations, Respondent did not deny Harris' assertion and his testimony on the point is consistent with the uncontroverted testimony by Roberts and McGee that Fierke said the three men would be worked wherever Respondent needed them, that, "We are not going to let them go, we are going to work them first, and however we want to work them." In addition to corroborating or like testimony by driver Gene Oenning, viz. that work was first offered to Baird and Douglas before Nelson and Padgett, and facts tending to establish, as I find, that Oenning himself was denied recall to work from about August 1, on various occasions until August 29 though Baird and Douglas worked, the testimony of the foregoing witnesses for the General Counsel is further and convincingly buttressed by Respondent's payroll records setting forth specific dates on which either preferential or top seniority was accorded Baird, Douglas, and Lockman over other employees. (See G.C. Exh. 8, records from July 15 on.)

D. Analysis and Conclusions

Respondent does not deny the demonstrated facts but argues that the seniority preference given the three striker "replacements" was a necessary adjunct to its right to replace economic strikers as provided by law, particularly in the construction industry where frequent dips in employment would surely lead to displacement of such replacements unless they are accorded a kind of superseniority insulating them from certain layoff behind more senior employees. Further, Respondent contends that the agreement with the Union was clearly understood and accepted by the union membership on July 15, so that, in effect, there was a waiver of employees' seniority rights. The limited intervenor advances the same waiver argument based on the agreement between the parties, and also argued orally that the rights accorded to the replacements were based on a valid "classification"; hence, the agreement should be honored. The General Counsel argues that there was no waiver of employee statutory rights sufficient to justify the outright discrimination against strikers in favor of the "replacements" so that Respondent's preferential treatment of them, being inherently destructive of employee rights under the Act violated Section 8(a)(1) and (3) of the Act as did Respondent's final offer insisting on unlawfully discriminatory

³ The contract provisions state at sec. 10, "This Seniority Article does not apply to two (2) permanent replacements, who were economic strike breakers. They shall have top ranking seniority at Western Ready Mix Co., and, at Gem, in sec. 10, "This Seniority Article does not apply to one (1) permanent replacement, who was an economic strike breaker. He shall have top ranking seniority at Gem City Ready Mix Co." (Emphasis added.) Although McGee prepared these provisions, it is clear, and I find, that he did so pursuant to the strongly established belief that this was merely the embodiment of Respondent's final offer and Respondent has offered no evidence whatsoever that this belief by McGee, or the finding herein, is not a correct interpretation of events, viz. that top seniority for Douglas, Baird, and Lockman was entirely a product of Respondent's final offer.

conditions for the reinstatement of economic strikers. I agree with the General Counsel.

In the landmark decision regarding superseniority for economic striker replacements,4 the United States Supreme Court approvingly noted the Board's assessment that such a plan bore the following characteristics:

- (1) Super-seniority affects the tenure of all strikers whereas permanent replacement, proper under *Mackay*, affects only those who are, in actuality, replaced. It is one thing to say that a striker is subject to loss of his job at the strike's end but quite another to hold that in addition to the threat of replacement, all strikers will at best return to their jobs with seniority inferior to that of the replacements and of those who left the strike.
- (2) A super-seniority award necessarily operates to the detriment of those who participated in the strike as compared to nonstrikers.
- (3) Super-seniority made available to striking bargaining unit employees as well as to new employees is in effect offering individual benefits to the strikers to induce them to abandon the strike.
- (4) Extending the benefits of super-seniority to striking bargaining unit employees as well as to new replacements deals a crippling blow to the strike effort. At one stroke, those with low seniority have the opportunity to obtain the job security which ordinarily only long years of service can bring, while conversely, the accumulated seniority of older employees is seriously diluted. This combination of threat and promise could be expected to undermine the strikers' mutual interest and place the entire strike effort in jeopardy. The history of this strike and its virtual collapse following the announcement of the plan emphasize the grave repercussions of super-seniority.
- (5) Super-seniority renders future bargaining difficult, if not impossible, for the collective bargaining representative. Unlike the replacement granted in *Mackay* which ceases to be an issue once the strike is over, the plan here creates a cleavage in the plant continuing long after the strike is ended. Employees are henceforth divided into two camps: those who stayed with the union and those who returned before the end of the strike and thereby gained extra seniority. This breach is re-emphasized with each subsequent layoff and stands as an ever-present reminder of the dangers connected with striking and with union activities in general.

In the light of this analysis, super-seniority by its very terms operates to discriminate between strikers and nonstrikers, both during and after a strike, and its destructive impact upon the strike and union activity cannot be doubted. The origin of the plan, as respondent insists, may have been to keep production going and it may have been necessary to offer super-seniority to attract replacements and induce union members to leave the strike. But if this is true, accomplishment of respondent's business pur-

pose inexorably was contingent upon attracting sufficient replacements and strikers by offering preferential inducements to those who worked as opposed to those who struck. We think the Board was entitled to treat this case as involving conduct which carried its own indicia of intent and which is barred by the Act unless saved from illegality by an overriding business purpose justifying the invasion of union rights.

Supra at 230-231. The Court also noted that the Board had specifically rejected the respondent's argument herein, i.e., that superseniority granted during a strike is somehow a legitimate corollary of an employer's right of replacement under NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333 (1937). Also noted was the Board's observation that superseniority not only went far beyond the right of replacement but was a form of discrimination in direct conflict with the express provisions of the Act prohibiting discrimination. It is clear, as the Board held, that such is the destructive impact on employee rights under the Act flowing from such a plan that no specific evidence of unlawful motive is needed to make out a violation. Supra at 225.

The instant plan has an even more pervasive effect than the one condemned in *Erie Resistor* because this plan not only affects layoffs, but also the assignment of daily and weekend seniority, recalls, promotions, and filling of job vacancies—recognizably more deleterious in impact. *Great Lakes Carbon Corp.*, 152 NLRB 988 (1965), enfd. 360 F.2d 19 (4th Cir. 1966).

Nor has the Board, which recognizes the importance of strike settlement agreements to encourage collective bargaining, allowed such agreements to be used as schemes to deny employees statutory rights. Thus, regarding such an agreement the Board has stated:

[W]e are unwilling to accord the literal terms of the agreement final and determinative weight. The policies of the Act would hardly be effectuated by our deferring to an agreement, the terms of which have been utilized by Respondent in a manner as to cloak discrimination against strikers.

Laher Spring & Electric Car Corp., 192 NLRB 464, 466 (1971). The Board also noted in Laher, supra, that an agreed plan under a settlement agreement to handle reinstatement rights of economic strikers which had a condition that it not be "intended to be discriminatory or misused by either party with the object of accomplishing a discriminatory objective" was entitled to be honored, referring to the agreement in issue in the case of United Aircraft Corp., 192 NLRB 382 (1971).

More recently, the Board has reasoned that the tolling of continuous credit for seniority purposes of strikers would penalize them for their strike activity in a manner which could affect their tenure of employment. Accordingly, the employer's denial of seniority for such reason violated the Act, the Board stated, because, citing the early General Electric Co. case, 80 NLRB 510, 513 (1948):

⁴ NLRB v. Erie Resistor Corp., 373 U.S. 221, 230-231 (1963).

It is well settled that, except to the extent that a striker may be replaced during an economic strike, his employment relationship cannot otherwise be severed or impaired because of his strike activity.

The Board noted that it had not subsequently departed from this holding and reaffirmed it. It is important to note the relevancy of this holding to the present case for the Board expressly held that the agreement on which the tolling of seniority was to be based and on which respondent insisted therein would be unlawful and that such was the inherently destructive force on important employee rights that its effectuation would violate Section 8(a)(3) of the Act. Interstate Paper Supply Co., 251 NLRB 1423 (1980).

The contention by the limited intervenor that economic strikers can be treated in this manner as a valid "classification" has been rejected before. Thus, Administrative Law Judge George J. Bott, in an opinion adopted by the Board, stated:

This kind of discrimination (denial of full seniority to strikers) is illegal discrimination under the cases, for the reinstated strikers were classified on the basis of their protected strike activity and treated differently and less favorably than they would have been if they had not interrupted their employment by engaging in a strike.

Transport Co. of Texas, 177 NLRB 180, 186 (1969). Judge Bott also noted in the same case that full reinstatement means "the restoration of all seniority rights that they had at the time of the strike," supra at 185.

In those cases wherein agreements which limit rather than take away certain employment rights are given effect, there have been plain conditions that no discrimination against employee statutory rights was intended or contained in the terms and implementation worked no such results. See United Aircraft, supra; Bio Science Laboratories, 209 NLRB 796 (1974), wherein the object in such plan was to place employees back into jobs and sections with which they were familiar, avoid retraining costs, and avoid continual reshuffling of employees disruptive of efficiency; and Roegelein Provision Co., 181 NLRB 578 (1970), wherein the denial of vacation benefits resulted from a plan which was totally bereft of discriminatory terms or purpose and applied to loss of time for any reason whatsoever, not aimed at time spent on strike. Since the "agreement" in the present case intentionally and openly on its face discriminates in favor of striker replacements and against returning strikers by lessening the latter's seniority rights due to their participation in a protected strike, I find that the agreement is inherently destructive of important employee interests, not entitled to be honored, serves as no valid basis for Respondent's admitted and demonstrated discriminatory preferences in seniority matters as described above, whether viewed as an "agreement" or otherwise, and that by according such superseniority to Baird, Douglas, and Lockman, Respondent has violated Section 8(a)(1) and (3) of the Act. Nor does the fact that the construction industry may experience fluctuations in business justify Respondent's discriminatory action seeking to insulate the three who crossed the picket line from such vicissitudes thereby providing them with greater protection against future unemployment than that afforded employees who engaged in the strike; indeed, such argument in defense of its actions merely serves to prove the discriminatory intent in Respondent's action already made abundantly clear by other evidence in this case.

Moreover, Respondent's waiver defense must fail, as there is no evidence that returning strikers expressly or consciously yielded their rights under the Act to be free from unlawful discrimination upon their reinstatement, nor would such a waiver of important rights be implied merely from the circumstances in this case. Daniel Construction Co., 239 NLRB 1335 (1979); Mastro Plastics v. NLRB, 350 U.S. 270 (1956).

Finally, it is clear and uncontroverted that Respondent insisted on its final offer being accepted before it would agree to a settlement in the negotiations with the Union and a return of the strikers to their employment. By insisting on such relinquishment of substantial statutory rights, viz. the diminution in their seniority status compared to nonstrikers, a condition which may not legally be imposed, I find that Respondent further violated Section 8(a)(1) and (3) of the Act inasmuch as Respondent thereby insisted on imposing harsher conditions on the return of strikers than on nonstrikers, clearly unlawful discrimination. American Cyanamid Co., 235 NLRB 1316, 1324-1325 (1978).

CONCLUSIONS OF LAW

- 1. The Respondent, Gem City Ready Mix Co., and Western Ready Mix Co., jointly, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
- 2. The Unions identified above are labor organizations within the meaning of Section 2(5) of the Act.
- 3. By insisting and conditioning reinstatement of its employees on acceptance of a final offer whereby their seniority rights were to be impaired in favor of nonstriking employees, Respondent violated Section 8(a)(1) and (3) of the Act.
- 4. By according preferential seniority for purposes of retention, recall, and assignment of daily and weekend overtime work or other employment-related conditions to Rodney Douglas, Frank Baird, and Dick Lockman over other employees for unlawfully discriminatory reasons, Respondent violated Section 8(a)(1) and (3) of the Act.
- 5. By engaging in the aforesaid conduct described above in paragraphs 3 and 4, Respondent interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act, and engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.
- 6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

I have found that Respondent has engaged in certain unfair labor practices. Accordingly, it will be recommended that Respondent be ordered to cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent unlawfully accorded preferential seniority rights to three individuals named above, it will be ordered that Respondent rescind such preferences, and restore the seniority status of all its employees to that existing prior to the unlawful change described more fully above in the body of this decision. Moreover, it will be ordered Respondent make whole employees for any loss of earnings suffered by them as a result of Respondent's discrimination against them in reducing their seniority for retention, recall, assignment of overtime work, vacancies, promotions, or other employment-related conditions, with interest thereon to be computed in the manner prescribed in F. W. Woolworth Co.,

90 NLRB 289 (1950), and Florida Steel Corp., 231 NLRB 651 (1977). Lest there be a future question arise as to the application or scope of my order rescinding the preferential seniority status of Baird and Douglas, it is here noted that I find Baird and Douglas on the record evidence not to be newly hired "replacements" but rather merely employees who left the strike and returned to work. Thus, they retain whatever seniority was possessed by them prior to Respondent's unlawful conduct, losing only the prohibited preferential seniority status.

[Recommended Order omitted from publication.]

⁶ See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962). See also regarding the make-whole remedy in this case, *Decaturville Sportswear Co.*, 205 NLRB 824 (1973).